CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 04-1575

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IN THE

Supreme Court of the United States

THEOPHILE CARTY,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

1. The Solicitor General argues that the Panel Majority's decision is consistent with *United States v. Scharton*, 285 U.S. 518 (1932). (Opposition ("Opp.") at 6). According to the Solicitor General, this is so because, "unlike the federal statute at issue there, the California statute at issue here requires a willful failure to file a tax return—*i.e.*, a failure to disclose information that the law requires to be disclosed."

This argument fails, for two reasons. First, the crime at issue in *Scharton* was a "willful[] attempt[]" to evade taxes; here, the crime at issue is "willful failure" to file a tax return with the intent to evade taxes. The Solicitor General does not

explain why this difference is important. Indeed, a "willful failure to file" a tax return could also be a "willful attempt" to evade taxes. Thus, this is a distinction without a difference.

Second, the Panel Majority held that Carty's crime involved fraud because it involved an "intent to evade" taxes, not because it involved the "willful failure to file a return." See, e.g., Appendix A at 1a ("We must decide whether 'intent to evade' is synonymous with 'intent to defraud' within the meaning of the removal provisions of the Immigration and Nationality Act"). The Solicitor General does not explain why the "willful failure to file" language in the California statute has any relevance whatsoever to whether *Scharton* controls this case.

2. The Solicitor General also argues that this Court in *Scharton* read the language at issue narrowly because of interpretive canons that are not at issue here. However, the Solicitor General does not deny that the Panel Majority failed to apply the canon of construction that this Court applied in *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), prohibiting courts from "assum[ing] that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." (Opp. 8) The Solicitor General defends that failure on two grounds, neither of which is tenable.

First, the Solicitor General points out that Carty "does not cite any decision that applies that canon in deciding whether fraud is an 'ingredient' . . . of an offense like the one at issue here." (Opp. 8). However, in *Fong*, this Court applied that canon of construction to the words "sentenced more than once," and there is nothing indicating that the canon would not apply equally to other words in that statute, including the words "crime involving moral turpitude."

Second, the Solicitor General argues that the canon does not apply because "the statute at issue here requires not only

an intent to evade taxes but the willful failure to file a return," which "does not have 'several possible meanings.'" For the same reason as above, this misses the issue. The Panel Majority's decision turned solely on the requirement of an "intent to evade" taxes, not because of the language "willful failure to file" a return. Whether or not "willful failure to file" has several meanings is irrelevant.

3. The Solicitor General claims that Petitioner Theophile Carty's crime involves "fraud" as defined in Black's Law Dictionary: "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." (Opposition ("Opp.") at 6) (quoting *Black's Law Dictionary* 685 (8th ed. 2004)). However, the Solicitor General does not even attempt to explain how Carty's crime of willful failure to file tax returns with the intent to evade taxes fits that definition.

Indeed, Carty's crime does not involve "fraud" as so defined. Carty was not accused of misrepresenting the truth, nor was he accused of concealing a material fact. Because Carty's crime does not involve fraud, it is not one of moral turpitude, and his Petition should be granted and the Panel Majority's decision summarily reversed.

4. In addition to failing to explain why Carty's crime allegedly involved fraud as defined in Black's, the Solicitor General also fails to address Carty's argument that his crimes did not involve fraud because they did not involve deceit, which is an element of fraud under California law. Carty's argument thus remains unrebutted.

5. The Solicitor General does not persuasively rebut Carty's argument that his crime did not involve fraud because fraud also requires an act of ***commission***, rather than mere ***omission***, and failure to file returns is an act of omission. Indeed, the Solicitor General does not deny that Carty's failure to file tax returns was an act of omission. However,

citing no precedent whatsoever, the Solicitor General asserts that this amounted to fraud anyway, because Carty "was under a legal obligation to disclose his income by filing a tax return, and his willful failure to do so, with the intent to evade taxes, thus amounted to fraud." (Opp. 5).

Why does the willful failure to perform a legal obligation (file tax returns) with the intent to evade taxes amount to fraud? The Solicitor General supplies no answer. The willful failure to perform a legal obligation with the intent to evade taxes is precisely that, not fraud. The Panel Majority's decision contradicts *Scharton*, in which this Court rejected the contention that "fraud is implicit in the concept of evading."

CONCLUSION

For the foregoing reasons, the Petition should be granted, and the decision below summarily reversed; or the case should be set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

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